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ABSTRACT

Legislation concerning teacher evaluation has been limited to date, and surprisingly little litigation has reached the courts. Although there are federal overlays and local interplay, the law of teacher evaluation is largely a state matter. This legal report gives an overview of the federal and state laws, discusses what the statutes say, and summarizes case law concerning teacher evaluation. A special central section offers a tabular summary of state statutes and administrative regulations. The tabular categories indicate where evaluation procedures are formed, who is responsible for conducting evaluations, which categories of teachers are evaluated, when the evaluations are to take place, what is the scope of the evaluations, and how evaluations are to be conducted. (Author/LD)

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A Legal Memorandum

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Teacher Evaluation

In an age of accountability--characterized by declining enrollments, tightening budgets, falling test scores, and increasing legal restrictions--teacher evaluation has become a "hot topic." Unfortunately, the topic has generated more heat than light. Despite (or perhaps because of) opposing educational philosophies and conflicting research results underlying teacher evaluation, legislation has been relatively limited so far, and surprisingly little litigation has reached the courts.

Although there are federal overlays and local interplay, the law of teacher evaluation is largely a state matter. Thus, the central section of this Legal Memorandum is a tabular summary of state statutes and administrative regulations concerning teacher evaluation. An overview of the federal overlay precedes the central section, and a summary of the case law follows it.

Federal Law

As in other areas of the law, constitutional considerations provide parameters for the substance and procedure of teacher evaluation. The First Amendment has provided teachers with some degree of freedom of conduct and appearance in the classroom. For example, California's highest court found that a probationary English teacher's reading of a composition which concluded with a vulgarity was constitutionally protected conduct where the purpose of the act was clearly educational and the welfare of the school or pupils was not adversely affected. *Lindros v. Governing Board of Torrance Unified District*, 510 P.2d 361 (Calif. 1973).

Similarly, the 14th Amendment's equal protection clause protects racial-minority teachers from discrimination in the evaluation process. Courts have held, for example, that school districts must use non-racial criteria in judging the performance of teachers. *Teel v. Pitt County Board of Education*, 272 F. Supp. 703 (D.N.C. 1967); *Sparks v. Griffin*, 460 F.2d 433 (5th Cir. 1972).

Federal statutes implementing the 14th and other post-Civil War amendments provide more specific limitations on the teacher evaluation process. The various titles of the Civil Rights Act prohibit discrimination based on national origin, race, religion, and sex. Sec. 504 of the Rehabilitation Act of 1973 and the Age Discrimination in Employment Amendments of 1978 add similar prohibitions based on handicap and age. The effect of these pieces of legislation and the regulations adopted by administrative agencies to implement them have been pervasive. For example, the regulations for Title VII of the Civil Rights Act, known also as the Equal Employment Opportunities

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Act, define in sophisticated psychometric terms the relationship of screening and evaluation instruments to job requirements in connection with minority candidates. While these regulations only provide direct protection to the special subgroups designated in the Act, they also indirectly affect all employees by educating judges to the school lore involved in school law. The same judge who sits one week in a Title VII case may sit the next week in a teacher evaluation case based on other grounds where a concept like criterion validity may be at issue.

Overview of State Law

Specific requirements for the evaluation of public school teachers are found at the state level. State laws concerning teacher evaluation cannot be examined and discussed in isolation. Sometimes they do not even appear as separate statutes. Three categories of state legislation and regulations provide an interlocking framework: teacher tenure, collective bargaining, and teacher certification laws.

A. Teacher tenure laws typically specify incompetence as one of the possible grounds for termination. The means of determining incompetence is specified, if at all, in a subsidiary or separate teacher evaluation law. California's Stull Act, for example, has been classified as both a tenure law and an evaluation law.

B. Similarly, collective bargaining and teacher evaluation laws are interrelated by determining in which category of the scope of negotiations teacher evaluation fits--is it a mandatory, permissive, or illegal issue? The answer will determine to a large extent whether specific procedures for teacher evaluation will be locally established beyond the minimum federal and state standards. What the answer is and where it is decided will vary from state to state.

   Connecticut's answer, for example, seems to be that teacher evaluation is a permissive issue for local teacher-board negotiations. Its answer is found at the legislative level in the interpretation by the appropriate administrative agency. As the Connecticut Commissioner of Education pointed out in a memo to all superintendents, the legislation specifically allows for "other guidelines as may be established by mutual agreement between the...board... and the teachers' representative."

   In contrast, Nevada's answer is that teacher evaluation is non-negotiable. The laundry-list style of itemizing in Nevada's amended collective bargaining statute was based on a decision by Nevada's highest court. *Clark County School District v. Local Government Employee-Management Relations Board*, 530 P.2d 114 (Nev. 1974).

   An Illinois appeal court reached a similar result, holding that a local school board could not, by collective negotiations, establish teacher evaluation procedures for nontenured teachers in the absence of, or beyond, statutory authorization. *Wesclin Education Association v. Board of Education*, 531 N.E. 2d 335 (Ill. App. 1973).

C. Finally, teacher certification law has an indirect effect upon teacher evaluation. While standards of competency or revised procedures for determining it at the certification stage are usually more stringent, they affect standards and procedures at the evaluation stage. New state proposals for performance-based standards and procedures for recertification will even more intimately interrelate with the corresponding means of teacher evaluation.

TABULAR OVERVIEW OF STATE STATUTES
and
REGULATIONS FOR TEACHER EVALUATION

STATE	WHERE		WHO				WHICH			WHEN				WHAT		HOW			
	State Level	Local Level	Bd. of Ed. Discretion	Supt. or Designee	Principal or Supvr.	Other	Teachers Plus	Teachers Only	Nontenured Teachers	Continually	Yearly	Differential	Other	Global	Categorical	Instrument	Recommendation	Copy	Other
Alaska		x	x				x				x				x			x	
Ariz.		x	x					x				x		x			x	x	
Calif.		x	x				x					x			x			x	x
Conn.	x			x			x			x									
Fla.		x			x		x				x							x	
Hawaii	x				x		x					x			x	x	x	x	
Idaho		x	x				x						x						x
Iowa		x																	
Kan.		x	x				x					x			x			x	
La.	x		x				x					x		x			x	x	
Mass.		x				x			x				x					x	
Mich.		x	x						x		x		x	x				x	
Nev.		x	x				x					x					x	x	
N.J.		x	x						x				x	x			x		
N.M.		x			x		x											x	x
Okla.		x	x				x					x				x		x	
Ore.	x		x					x			x				x	x		x	
Pa.	x			x			x					x			x	x		x	x
S.D.		x	x				x					x			x				x
Tenn.		x					x					x							
Wash.		x	x				x				x				x		x		
W. Va.	x		x				x			x									
Wyu.		x			x			x		x									
(23)	(6)	(17)	(14)	(2)	(4)	(1)	(16)	(3)	(3)	(3)	(5)	(10)	(4)	(4)	(8)	(4)	(6)	(14)	(5)

What the Statutes Say

Fewer than half (23) of the states have statutes or administrative regulations directly dealing with the evaluation of public school teachers. Their provisions vary widely in terms of both scope and specificity, as is readily seen in the accompanying table which categorizes and summarizes them. The tabular categories relate to where evaluation procedures are primarily formulated, who is primarily responsible for conducting evaluation, which categories of teachers are evaluated, when the evaluations are to take place, what is the scope of evaluation, and how evaluation is to be conducted.

"WHERE" refers to the primary locus for establishing the policies and procedures for teacher evaluation. In the great majority (17) of the states with teacher evaluation laws, this matter is left largely to the local level. However, an understanding which is explicitly made in some state statutes (e.g. Alaska, Arizona, and California) and which is generally otherwise inherent in our legal system is that these local procedures must meet the minimum statutory standards. In most cases the determination is left to the board of education. However, in about a third of these states the input of local teachers is provided for in the form of either advice (Arizona, California), consultation (Nevada, Oklahoma), or negotiation (Connecticut).

"WHO" refers to the categories of persons empowered to conduct or delegate the evaluation. In the majority (14) of the states which address this issue, the answer is left to the discretion of the local school board. In a small minority (2) of states the matter is left specifically to the superintendent's discretion. In either case, the discretion is presumably bound by the regulations concerning certification. This presumption is made explicit in Pennsylvania, which entrusts the matter to the superintendent or a designee having supervisory responsibility for the evaluatee's work. In a few states, the matter is specifically left to the evaluatee's principal or immediate supervisor. It is explicitly specified in two of these four states and otherwise generally understood that exercise of this power requires the concurrence of the local board or superintendent. One state, Massachusetts, has a unique arrangement for this category; it specifies that the evaluation is to be conducted by a tripartite committee, consisting of one member chosen by the school board, one by the evaluatee, and the third chosen by the other two members.

"WHICH" refers to the categories of teachers to be evaluated. The first column under this category contains the predominate grouping (16), in which not only teachers but other certificated personnel are evaluated. In most such cases, the formula is generic--e.g., "professional" or "certificated" personnel, Kansas and West Virginia use even more all-encompassing phrases--"all employees" and "every employee," respectively. Some "teachers plus" states--e.g., Florida, Louisiana, and Nevada) specifically enumerate categories of personnel--e.g., teachers, librarians, and counselors. Connecticut makes explicit a general understanding that the superintendent is excepted from the specified (but not necessarily other) procedures for evaluation. In contrast, a few states designate only teachers--or more specifically in the case of Arizona, only certificated teachers--as evaluatees. Finally, a similarly small number of states reserve evaluation only for nontenured (also called "probationary" or "provisional") teachers.

"WHEN" refers to the specification, if any, of the frequency of evaluations. A few states answer this question only generally: "continuously" in Connecticut, "on a regular basis" in West Virginia, and "periodically" in Wyoming. What such continual

evaluation means is left immediately to professional discretion and ultimately to judicial determination. In some (5) of the states, evaluation is mandated to be on a yearly basis. However, in the majority (10) of the states which define frequency of evaluation, a differential formula is provided based on tenure status or length of service. Where the differential is based on tenure status, the pattern is either once (California, Louisiana, and Tennessee) or twice (Arizona, Oklahoma, Pennsylvania and South Dakota) per year for nontenured teachers and varies from once every year (Pennsylvania), every two years (Arizona, California, Louisiana), or every three years (Oklahoma, South Dakota, Tennessee) for tenured teachers. The combinations vary even more where length of service is divided into three categories rather than the two tenure categories (four times during the first year, twice during the second year, and yearly thereafter in Hawaii; twice during the first two years, yearly during the second two years, and once every three years thereafter in Kansas). Other statutory solutions are provided in Massachusetts (end of probationary period) and New Jersey (three times per year) based on their statutes' application to nontenured teachers only. Idaho requires an evaluation during the third year of experience in one school district.

"WHAT" refers to the degree of specificity of the scope of evaluation. In some (4) of the states, the statutory standard is very broad--e.g., "competence" (Arizona, Louisiana, and New Jersey). In the majority (8) of states specifying a scope standard, a categorical approach is used--e.g., personality, preparation, technique, and pupil reaction in Pennsylvania. Student progress is specifically enumerated as one of the categories in California and at least partially expressed in the Kansas and New Jersey statutes.

"HOW" refers, of course, to the methods of evaluation to be used. Representing the categorical approach to the scope standard, instruments for evaluation have been developed in four states. Pennsylvania's rating form, for example, provides from four to six descriptors for each of the four previously mentioned categories. A rating of "unsatisfactory" must be substantiated by anecdotal records. Oregon's instrument represents a more open-ended and simplistic approach, requiring brief narrative responses to MBO-based queries. Hawaii's instrument, on the other hand, provides for specific definitions and separate ratings for each of its categorical descriptors or criteria. Oklahoma provides a package of alternative approaches: a checklist instrument, an MBO record, and a narrative option.

A group (6) of states requires recommendations for improvement by the evaluator, typically to be delivered in a conference with the evaluatee. California, New Mexico, and Tennessee require evaluation conferences but do not specify an affirmative duty for supervisory recommendations. A much larger group of states (14) specify some type of requirement concerning a copy of the evaluation--that it be given to, signed by, or kept in the records of the evaluatee. This requirement is not without teeth in some statutes. In Michigan, for example, failure to give a copy of the evaluation statement to a nontenured teacher within 60 days of the close of the school year automatically results in contract renewal for the subsequent year.

Other procedural provisions include the bare conference requirement in three states, West Virginia's general mandate that evaluation be "open and honest" and with "due process," and Pennsylvania's prerequisite of two consecutive unsatisfactory ratings

for dismissal. New Mexico has a similar procedural protection, requiring at least two evaluation conferences prior to dismissal proceedings, with sufficient intervening time to allow for observation and remediation of deficiencies.

Summary of Case Law

The case law concerning teacher evaluation is difficult to summarize, not only because of the great variety of statutory provisions, but also because of the relative paucity of reported decisions. The scarcity of reported decisions is in part due to the recency of the teacher evaluation statutes and regulations and is also attributable to the reluctance of administrators to use "incompetency" as grounds for demotion or discharge. For example, in Pennsylvania which has probably the longest and most developed legal history concerning teacher evaluation, only about 100 teachers have been charged with incompetency in any kind of proceeding since 1940. This works out to only about 2.7 cases per year. Of these, the charges have been upheld in only slightly more than 50 percent of the cases.

Jurisdictional variety and historical paucity notwithstanding, certain guiding generalizations do emerge from the litigation to date. First and perhaps foremost, courts tend to be strict about compliance with the procedures mandated in the legislation and regulations concerning teacher evaluation. For example, dismissal charges against teachers in Pennsylvania based on incompetency were not sustained in cases where the rating system was not strictly followed, as in *Appeal of Sullivan County Joint Board*, 189 A.2d 249 (Pa. 1963); where the evaluation form did not show unsatisfactory ratings, *Appeal of Cable*, 61 D & C 298 (Pa. Comwlth., 1948); and where the required ancedotal records were not provided, *New Castle Area School District v. Bair*, No. 493 C.D. 1976 (Pa. Cmwlth., May 2, 1977).

Procedural defects can work both ways. Failure of the Pennsylvania Department of Education to publish its rating form pursuant to the Commonwealth Documents Law (until just recently) precluded it from enforcing its accompanying regulation that a teacher must be rated unsatisfactory on two consecutive evaluations before he or she can be dismissed on grounds of incompetency. *Board of School Directors of the Centennial School District v. Pennsylvania Secretary of Education*, No. 1319 C.D. 1976 (Pa. Cmwlth., May 24, 1978). At least the courts are consistent in requiring strict statutory compliance by all parties.

Two decisions by the New Jersey Commissioner of Education reveal some flexibility in applying procedural requirements. In *Foleno v. Board of Education* (1978), a nontenured teacher's claim of entitlement to contract renewal was rejected despite the local board's failure to conduct the required three evaluations. However, the board was ordered to give the teacher 60 days' pay. In another such case, the Commissioner ruled that the board's failure to give a teacher a separate written total performance evaluation wasn't a sufficient reason to render its dismissal decision fatally defective. *Shaw v. Board of Education* (1978). However, these rulings lack the precedential effect of appellate court decisions and involved only nontenured teachers. Decisions in other jurisdictions support the view that courts tend to be strict about adherence to teacher evaluation procedures, e.g., *Wojt v. Chimacum School District No. 49*, 516 P.2d 1099 (Wash. 1973); *Van Horn v. Highline School District No. 401*, 562 P.2d 641 (Wash. App. 1977).

Even where local discretion is permitted, districts should establish clear standards and procedures for determining competence. In a recent case, failure to do so led to the reinstatement with back pay of a terminated teacher in *Beebee v. Haslett Public Schools*, 235 N.W. 2d 724 (Mich. 1976).

School administrators can ill afford to neglect their procedural duties as evaluators under the statute. They may ultimately suffer in their role as evaluatees under the same statute. In one case the dismissal of a principal was upheld based on his failure to complete the evaluation of all the teachers under his supervision and for neglecting other supervisory duties. *Schneider v. McLaughlin Independent School District No. 21*, 241 N.W.2d 574 (S.D. 1976).

If the courts have tended to hold school authorities rather strictly to procedural requirements, they have been considerably more deferential to school authorities in substantive aspects of teacher evaluation. This attitude is put in proper perspective by looking at cases dealing with the issue of whether pupil test scores can be validly used as a basis for unsatisfactory evaluation leading to dismissal. An examination of their factual contexts warns against over relying on, or generalizing about, pupil achievement as grounds for termination. In a case which has been on the books for over 40 years, a teacher's dismissal based partly upon pupil test scores was reversed. However, the court's discussion about the unreliability of such a measure was merely peripheral, inasmuch as several other vague charges of incompetence and negligence were the determinative issues in reaching the reversal. *Gulich Township School District v. Korman*, 31 D. & C. 197 (Pa. C.P. 1937).

In *Karstetter v. Evans*, 350 F. Supp. 209 (D. Tex. 1971), the use of pupil test scores as evidence for a teacher's dismissal was upheld, but once again the issue was primarily procedural, and the evidence was largely peripheral.[1] The court ruled that where a teacher had received notice, prior to a hearing, that one ground for nonrenewal was "evaluation of her work compared with other teachers," her procedural due process rights were not violated by introducing evidence of the low achievement of her pupils.

Finally, in the better known case of *Scheelhaase v. Woodbury Central Community School District*, 488 F.2d 237 (1973) the Eighth Circuit Court of Appeals specifically and squarely reversed the Iowa federal district court's finding that a teacher's professional competence could not be determined solely on the basis of her student's standardized achievement test scores. The court's attitude is obvious in its words:

> It is possible that the discretion of a Board may, at times, to those more generously endowed, seem to have been exercised with a lack of wisdom. But the Board's decisions in the exercise of its discretion are not vulnerable to our correction merely if they are "wrong,' sustainable only if they are "right".... It is our holding that the administration of the internal affairs of the school district before us has not passed by judicial fiat from the local Board, where it was lodged by statute, to the federal court. Such matters as the competence of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration.

The court's language serves not only as an example of the deferential attitude to administrators' expertise but also as a caveat against a loose interpretation of the case's holding. The same issue posed by a tenured teacher in a state court under a specific teacher evaluation statute might well yield a different result.

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[1] Fain v. Bd. of Ed., File No. 142532, Super. Ct. (Conn.) October 29, 1978.

Conclusions and Recommendations

The number of cases on this subject is small, and the statutory context is varied, but a few conclusions may be drawn:

1. Present or proposed teacher evaluation policies and practices should be examined in light of several factors: constitutional considerations and federal civil rights laws; state statutes and administrative regulations; and the local collective bargaining agreement. Teacher evaluation is basically a state matter, but the federal overlay, including constitutionally protected rights, and the local interplay involving collective bargaining cannot be ignored.

2. Courts tend to strictly apply the procedural requirements of teacher evaluation laws. Principals who fail as evaluators may, themselves, fail as evaluatees as a result.

3. Courts tend to defer to the discretion of school authorities with regard to the substantive aspects of teacher evaluation cases. However, the limits of professional discretion also cannot be ignored. The indisputable influence of facts (e.g., tenured as contrasted to nontenured teachers) and the inservice education of judges (e.g., Title VII job-relatedness cases) can yield differences constituting distinctions.

Teacher evaluation is becoming an increasingly important issue. More and more states (e.g., New Jersey, Ohio) are enacting or considering legislation to establish or expand the requirements for evaluating public school personnel. Although the amount of litigation has not been great, the next few years should prove vital as courts fill in the gaps left by legislators. Informed and responsible action by school principals can contribute to an equitable and effective system of professional evaluation.

This Legal Memorandum was contributed by Perry A. Zirkel, Dean and Professor of the School of Education at Lehigh University in Bethlehem, Pa., and Christopher Castens, an attorney with Prentice-Hall, Inc., Englewood Cliffs, N.J.

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